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91-662

No. 91-_____

Supreme Court, U.S.
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IN THE
SUPREME COURT of the UNITED STATES

October Term, 1991

Cristopher Joel Zebert

Petitioner,

V.

Board of Bar Admissions of
the State of Mississippi

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF MISSISSIPPI

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Supreme Court of Mississippi violate the petitioner's rights to due process by not complying with a state administrative procedural rule granting exclusive appellate jurisdiction to a Chancery Court of proper jurisdiction.

2. Did the Supreme Court of Mississippi violate the petitioner's rights to due process by not complying with it's own court rules, Rules of Evidence and the Rules of Procedure that it adopted to function under and to have other courts

function under when reviewing cases, wherein the State Supreme Court could not exercise proper jurisdiction.

3. Did the Supreme Court of Mississippi misapply the Rules of Admission to the Mississippi State Bar by ruling in a 4 to 3 decision, that the administrative agency did not act arbitrary, capacious or malicious when the agency, failed to comply with their own administrative rules that the Chief Justice of the Mississippi Supreme Court approved, and the agency further failed to submit any evidence to the Court of proper jurisdiction.

PARTIES BELOW

The following person were parties to the proceeding in the Mississippi Supreme Court, the court whose judgment is sought to be reviewed:

Jerome E. Hafter

Thomas Lowe

James Mozingo

Peggy Jones

Fielding Wright, Jr.

Thomas McNeese

Paul Moore

Bennie Turner

Richard R. Salloum

Cristopher J. Zebert

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OPINION BELOW

The Mississippi Supreme Court's opinion, reviewing the appellate court's decision is reproduced herein at Appendix 1a. The appellate court's judgment is reproduced herein in Appendix 68a.

JURISDICTION

The judgment sought to be reviewed by Writ of Certiorari was dated and entered March 27, 1991. The court order denying petitioner's request for rehearing was entered and filed May 29, 1991, and is reproduced here in Appendix 1a. The Statutory provision conferring jurisdiction on

this court to review the judgment in question by Writ of Certiorari is Title 28 Section 1257 of the United States Code.

CONSTITUTIONAL ISSUES

The due process clause of the United States Constitution of the 5th and 14th amendments..

State laws involved that control Federal guaranteed rights.

Rules Governing Admission to the Mississippi State Bar. The Mississippi Supreme Court Rules, the Mississippi Rules of Civil Procedure, the Mississippi Code Annotated Section 73-3-2(1).

STATEMENT OF THE CASE

Petitioner, Cristopher J. Zebert, is an adult resident citizen of Rankin County, Mississippi.

Petitioner sat for the Mississippi Bar Examination in February of 1989. The multistate multiple choice portion of the bar exam revealed a score of 134, exceeding the required score of 123. The multistate essay portion of the bar exam revealed a score of 70.0. The Mississippi essay portion of the bar exam revealed a 67.9. These scores, already being subject to a scale were once again scaled which

resulted in an overall score of 69.3, not meeting the required score of 70.0.

Subsequent to the release of the results of the February, 1989 Bar examination, Petitioner duly petitioned the Board for review, and submitted to the Board the statutory required Memorandum which particularized how the grade awarded was unjustified by the merits of the answer.

Three areas of Petitioner's Bar examination were incorrectly graded. MSE (1) Wills and Estates, MSE (1) Domestic Relations, and MSE (1) Workers' Compensation. The error

in the grading procedure of these areas are more precisely set forth in the Memorandum contained in Appendix 90a which points out the arbitrary and capricious action of the Board, thus resulting in a substantial misgrading of Petitioner's exam. Therefore, the grades awarded were unjustified due to the merits of the answers.

The Board ruled that Petitioner should not be issued a Certificate of Admission to the Mississippi State Bar.

Since the Board failed to provide Petitioner with a copy of the Order denying his Petition for

Review, he was forced to file a complaint in Chancery Court. The Board filed a Motion to Dismiss the Complaint, and then provided Petitioner a copy of their Order denying his Petition for Review.

The two parties then advanced an appellate record to the Chancery Court by stipulations, Appendix 65a, thereby rendering the Complaint an Motion to Dismiss moot. The Board served no answer to the original Petition and Memorandum upon Petitioner and offered no answer to the stipulated appellate record, as required by the Rules of Admission.

The Chancellor considered the

stipulated appellate record before him, and issued an Opinion which stated that an Order should be entered directing the Board to issue a license to the Petitioner, Appendix 68a. This Order was entered on the 7th day of December, 1989, Appendix 76a.

The Board then filed a Notice of Appeal, a designation of the record, and a Motion to Stay the Judgment with the Chancery Court.

Petitoner then filed a response to the Motion to Stay the Judgment pointing out the failure of the Board to file an answer to the Petition. The Chancery Court denied

the Motion to Stay the Judgment and entered an Order of Denial on the 31st day of January, 1990.

The Board did not comply with either court order.

On February 6, 1990, Petitioner filed a Writ of Mandamus or in the alternative a Writ of Extra Ordinary Relief. The Board then filed a second Motion for Stay of Judgment in the State Supreme Court. The Supreme Court not having Jurisdiction of the case, granted a Stay of Judgment on September 5, 1990. The Supreme Court denied the Petition for Writ of Mandamus on September 5, 1990, some seven months after it was filed.

The State Supreme Court reversed and rendered the decision of the appellate Court of Chancery on March 27, 1991.

REASONS FOR GRANTING THE WRIT

This case presents a setting in which the Board of Bar Admissions had every opportunity to present evidence to the court of proper jurisdiction. The Board failed to submit, any evidence to the appellate Court of Chancery, and then failed to comply with the court order as required by their own rules.

The Rules of Admission are promulgated by the Board of Bar

Admissions, and approved by the Chief Justice of the Mississippi Supreme Court. In the selection of these members of the Board of Bar Admissions the following process is used. The individual members are appointed by the Supreme Court, in fact each Justice appoints one member, from his or her own voting district. The Chairman of the Board of Bar Admissions reports directly to the Chief Justice in order to have the required court approval for the Rules of Admission.

The State Supreme Court makes an attempt in this case to take jurisdiction after they approved the

rules, that do not allow them to have jurisdiction. The reason the court gave jurisdiction to another court is because of the conflict of interest that could arise, as it has in this case. The conflict of interest in this case was brought in to focus, when the author of the contracts examination failed to comply with the Rules of Admission. The author of the contract examination, also serves in the capacity as the Chairman of the Board of Bar Admissions, and he was appointed by the opinion writer for the State Supreme Court in this case. The Chairman of course reports to the Chief Justice, and resides in

the voting district of his appointor, the author of the opinion. The above mentioned facts are necessary for an understanding of the reasoning behind the Supreme Court of Mississippi not granting itself jurisdiction in these cases wherein the rules are not complied with, and the rule violators are litigants, that are appointed by the individual Justices for the Court.

The appellate Court of Chancery is authorized by the Rules of Admission to have exclusive jurisdiction to hear these appeals providing the only due process authorized by the State of

Mississippi, Appendix 52a.

I.

The Supreme Court of Mississippi violated the Petitioner's right to due process by not complying with a state administrative agency rule granting exclusive appellate jurisdiction to a Chancery Court of proper jurisdiction...

The Court misapprehended the point of law that it had the jurisdiction to hear and consider this appeal. The Court adopted the rules governing admission to the Mississippi State Bar on November 1, 1979. These rules are authorized by

statute Mississippi Code Ann. Section 73-3-2 (1). The statute reads in pertinent part as follows:

> "power to admit persons to practice as attorneys in the courts of this State is vested exclusively in the Supreme Court of Mississippi."

the Court has limited the remedy available for a denial of a petition for review to an appeal to the Chancery Court of one's residence. The rule of admission that controls all appeals is Rule XII, which reads as follows:

"RULE XII APPEAL FROM
BOARDS FINAL DETERMINATION"

> "A failing applicant who has filed a petition for review as provided in Rule XI shall have the right to appeal from the order of the Board denying his petition to the Chancery Court of the County of his residence within six (6) months of receipt of notice of such order."

The State administrative agency must follow its own regulations, E.g. Vitarelli v. Seaton, 32 L.Ed. 2d 1012, 1020-1022 (1959), Morton v. Ruiz, 945 ct 1055, 1074 (1974). The Board is an administrative agency and through its executive governing body the State Supreme Court and in the Rules of Admission, did not provide

for an appeal by its said Board. Therefore the Board is not allowed to perfect any appeal in the State Supreme Court. The Court through the Rules of Admission provides the right to an appeal by only the applicant when the applicant timely files a petition for review.

The Court delegated their reviewing authority to the Chancery Court. This delegation of authority avoids the conflict of interest that arises when Court is faced with applying its executive function rather than its judicial function. This conflict of interest arises when each Justice individually appoints a

member of the board, and then finds himself in the position of ruling on a case wherein his agent is a litigant. The Chancery Court's judicial review is free from the conflict on interest and ensures due process of law.

The above referenced appointment of board members is controlled by Rule II of the Rules of Admission and in part reads as follows:

> "Rule II Board of Bar Admissions Section 1, Appointment Term of Office."
>
> "By virture of Section 73-2-2, Mississippi Code of 1972, the Mississippi

> legislature created a Board to be known as the "Board of Bar Admission" which shall be appointed by the Supreme Court of Mississippi. The Board shall consist of nine (9) members, who shall be member in good standing of the Mississippi State Bar and shall serve for terms of three (3) years. Three members shall be appointed from each Supreme Court District, one (1) by each Supreme Court Justice from his district...."

The strain of the conflict of interest was futher aggravated by the fact that the author of the contract examination failed to comply with the Rules of Admission. The failure, goes directly to job performance and competence, as well as being an embarrassment for the individual justice that made his appointment.

The model answer that the appointee was in charge of supplying pursuant to Rule XI, Section 1, was not supplied within the forty five (45) day time period allowed for an applicant to perfect his appeal.

The United States Supreme Court in Marshall v. Jerrico, Inc., 446 U.S. 238 (1980) stated:

> "Requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decision making process." It ensures that no person will be deprived of his

> interests in the absence of a proceeding in which he may present his case with assurance that the arbitrator is not predisposed to find against him." Marshall v. Jerrico, Inc., 446 U.S. 238 (1980)

The State Supreme Court Justices are in fact predisposed in this case to rule against the petitioner, and in favor of their agents. In discussing the due process requirement for fair tribunal the United States Supreme Court has stated:

> "A fair trial in a fair tribunal is a basic requirement of due process... not only is a biased decision maker constitutionally

> unacceptable but, our system of law has always enfeavored to prevent even the probability of unfairness." Withrow v. Larkin, 421 U.S. 35 (1975)

II.

The Supreme Court of Mississippi violated the petitioner's right to due process by not complying with its' own court rules, Rules of Evidence and the Rules of Procedure that it adopted to function under and to have other courts function under when reviewing cases wherein the State Supreme Court could not exercise proper jurisdiction.

The Supreme Court of Mississippi dispenses with its' own

rules, in a footnote which reads as follows:

> "Inexplicably, Applicant F's principal argument in his brief on this appeal is that the Board has "confessed" the allegations of his "Complaint." Applicant F appears of the impression that his action in the Chancery Court of Rankin County was an original civil action subject to the Mississippi Rules of Civil Procedure. Because the Board did not file an answer, under Rule 8(2)(d), Miss.R.Civ.P., Applicant F says his complaint should be taken as admitted. To be sure, the Chancery Court had subject matter jurisdiction of Applicant F's claim. Gill v. Mississippi Department of Wildlife Conservation, ____ So. 2d ____, _____ (Miss. No. 07-CC-59222,) (not yet

> reported). Applicant F's application, however, was in the nature of a petition for judicial review of an administration action. The Chancery Court was sitting as an appellate court. The Board's failure to file a Rule 8 answer was of no moment. Appendix 8a.

The Court clearly misapprehends the fact that the complaint was a controlling document in the proceeding. The complaint that the Court refers to, was never submitted to the Chancellor, and was only filed because, the Board did not serve, written notice on the petitioner. The answer the Board failed to file was required by the Rules of Admission to be filed to the Petition for Review, and Accompanying

Memorandum. A proper analysis of the facts and applicable rules, reveals that no answer to the Petition for Review and Accompanying Memorandum was ever filed before the proper court, as required by Rule XII, Section 3 of the Rules of Admission, Appendix 54a.

Once the Court improperly took jurisdiction of the appeal of a party that was not authorized to bring any action, the Court then did not comply with the following rules while they gave **de novo** review.

The trial court practice is governed by the Mississippi Rules of Civil Procedure, Mississipi Rules of

Evidence, Applicable Uniform Rules, and local rules where adopted pursuant to Mississippi Rules of Civil Procedure. (P. 83, Supreme Court Rules Comment 1) The controlling rule reads as follows:

> "These rules govern appeals to the Supreme Court of Mississippi and proceedings on petitions for writs or other relief which this court or a justice of this court is empowered to grant. When these rules provide for the making of a motion in the trial court the procedure for making such motion shall be in accordance with the practice of the trial court."
> (Supreme Court Rule 1)

The trial court in the instant case was sitting as the appellate court.

The Court was required to proceed under the Mississippi Rules of Civil Procedure, and Evidence. The above referenced Supreme Court Rule requires that the Mississippi Rules of Civil Procedure be followed when the Chancery Court sits as an appellate court. The rules also require that the Supreme Court comply with those same rules of Civil Procedure followed by the Chancery Court. The court has the power to suspend these rules on the application of a party or on its own motion. (Supreme Court Rule 2) However, there has been no application or motion presented to

allow a suspension of the Supreme Court Rules. The proper court to file any such motion for suspension is in the appellate Court of Chancery, the only court with jurisdiction.

In applying these rules in a De novo Application the issue before an appellate court is whether by a preponderance of the evidence the Board was aribitrary, capricious or malicious in denying the Petition for Review filed by Petitioner. The standard of review to be followed by the appellant court is contained in Rule XII, Section 2 of the Rules of Admission which reads as follows:

Standard of Review

> The grounds of appeal shall be limited to those specified in the applicant's Petition for Review before the Board. The Chancery Court shall not regrade the examination or substitute its judgment of the merits of the applicant's examination for the decision of the Board. The Board's decision to fail an applicant shall be reversed by the Chancery Court only if the applicant proves by a preponderance of the evidence that the Board's denial of his Petition was arbitrary, capricious or malicious.

An appellate court is thus not allowed to regrade the examination. The Board failed to submit evidence in Chancery Court in the manner that

the rules require. Therefore, no evidence was presented to the Chancery Court to substantiate the Board's denial of the Petition for Review. The Board by not filing an answer to the Petition for Review has therefore offered no proof or evidence in support of their position and action. Every appellate court conducting judicial review is bound by the fact that no contrary evidence is available in the appeal record for any court to consider. The Board did not file an answer nor present any evidence to the Chancery Court. The Board never filed a motion asking the Court to grant additional time to

allow the Board to file an answer to the Petition for Review, as is required by Rule XII, Section 3 of the Rules of Admission which reads as follows:

> Record of Appeal
>
> The Board must within thirty (30) days after the applicant's appeal is filed in Chancery Court, or within such further time as the court may grant, file with the Court and serve upon the applicant an answer. The Board shall therewith forward to the Court applicant's Petition together with copies of examination questions (excluding the MBE), model answers or other analyses used in grading the examination, and the original of applicant's answers.

Therefor the Application of Rule 8(2)(d) is in accordance with the practice of the trial court.

The State Supreme Court, and its agency are making rule changes without complying with their own rules. This type of action was beyond what the legislature contemplated. This point is demonstrated by the case of Motor Vehicle Manufactures Association v. State Farms Mutual Automobile Insurance Company, 680 F. 2d 206 (1982), the United States Court of Appeals, Distict of Columbia Circuit discussed the requirements and considerations of a board attempting

to disregard the law and go in their own direction. In that case the Court stated as follows:

> "An Administrative Agency, possessing power delegated by the legislative branch of government must comply with the legislative requirement that its decision be reasoned and in accordance with the purposes for which power has been delegated." Motor Vehicle Manufactures Association v. State Farms Mutual Automobile Insurance Company, 680 F. 2d 206 (1982)

The Board presents no reasoned analysis for not filing an answer with the appellate Court of Chancery.

In expressing its views the Court went even further in its analysis and stated:

> ..."Agencies may not ignore the mandates they have received from Congress, and reverse course without a reasoned or rational foundation for doing so. In this regard, we emphasize that the Courts, Administrative Agencies and Congress are partners, not adversaries. Courts... ensure that agencies exercise their judgment only in accordance with the will of Congress." Motor Vehicle Mfgs. Association v. State Farms Mutual Automobile Insurance Company, 680 F. 2d 206 (1982)

The Board has not articulated a satisfactory explanation for its

actions, in that they do not address any of petitioner's points of error in his petition and then compare the points to the model answers. The Board made no effort to show the rational connection between the facts found, and the choice made.

In his concurring opinion for the Court, Judge Edwards speaks of the Judicial role in administrative agencies cases similar to this case and the Court states:

> ..."This judicial role does not change when the Court, as here, is confronted when a hotly contested and highly controversial case. The Court, thus does not become a rubberstamp for lawless agency action merely because the

> questions posed are difficult or sensitive." Motor Vehicle Mfgs. Asso. v. State Farms Mutual Automobile Insurance Company, 680 F. 2d 206 (1982)

And finally in the concurring opinion, the Court's closing statements described quite well the Board's actions in petitioner's case when the Court stated:

> "Indeed, the agency decision appears to be nothing more than a determined effort to achieve a particular result without regard to the facts at hand. Plainly, this is not reasoned decision making, and it cannot be santioned by this Court." Motor Vehicle Mfgs. Asso. v. State Farms Mutual Automobile Insurance Company, 680 F. 2d 206 (1982)

The State Supreme Court also overlooked the fact that it has previously ruled as an appellate court in the instant case, and not as a licensing agency. The Court in this respect denied without prejudice Petitioner's Petition for a Writ of Mandamus or in the Alternative an Extraordinary Writ and allowed the four (4) issues raised therein to be considered in the appeal.

The court did not respond to the issues raised and petitioned for in the mandamus. Which would have necessarily forced a discussion of the Boards failure to file an answer to the Petition for Review. Those issues were as follows:

Issue 1. Whether the Chancery Court Judge abused his discretion by reviewing the stipulated record, and ordering the Honorable Board of Bar Admissions to immediately issue petitioner a Certificate of Admission.

Issue 2. Whether the Honorable Board of Bar Admissions are allowed to violate the Rules Governing Admission to the Mississippi State Bar.

Issue 3. Whether the appeal taken is frivolous due to the fact that no answer to the original petition was served upon the Applicant or filed in the Chancery

Court.

Issue 4. Whether the procedural due process rights of the Petitioner will be violated if the Rules Governing Admission to the Mississippi State Bar do not have to be followed by the Honorable Board of Bar Admissions.

The State Supreme Court did not comply with any of its rules in regard to this case with respect to Appellate Procedure, the Rules of Evidence, and the State Supreme Court Rules. Thus providing the Petitioner with none of the essential due process protection.

III.

The Supreme Court has misapplied the Rules of Admission to the Mississippi State Bar. Ruling by a four (4) to three (3) vote that the administrative agency did not act arbitrary, capricious or malicious when the agency, failed to comply with their own administrative rules, that the agency promulagated and the Chief Justice of the Mississippi Supreme Court approved and the agency further failed to submit any evidence to the court of proper jurisdiction.

It should be noted that two members of the State Supreme Court that had not appointed any member of the Board of Bar Admissions, were not

allowed to participate in this decision.

The Board failed to comply with Rule XII, Section 3 of the Rules of Admission, in that they filed no answer, nor made any application to any court for additional time to file an answer as the rules require. (Rule XII, Section 3) The law is clear that administrative agencies must follow their own regulations E.g. Vitarelli v. Seaton, 32 L.Ed. 2d 1012, 1020-1022 (1959) - Morton v. Ruiz, 945 ct 1055, 1074 (1974).

Petitioner has a right to require the state administrative agency to comply with its own regulations in dealing with him. In Goldberg v. Kelly, 397 U.S. 254

(1970) the Court held that administrative regulations create a property right. The interest in a license to practice law is a recognized property right. Schware v. Board of Bar Examiner, 353 U.S. 232 (1957); Tyler v. Vickery, 517 F. 2d. 1089, 1104 (5th Cir. 1975) cert. denied 426 U.S. 940 (1976); Jones v. Board of Commissioner of Alabama State Bar, 747 F. 2d 996 (11th Cir. 1984); Schemfield v. Prather, 387 F. Supp. 676 (D.C. Miss. 1972); Lipman v. Van Zant, 329 F. Supp. 391 (D.C. Miss. 1971).

> "A State Cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that controvene the due

> process or equal protection clause of the Fourteenth Amendment." Schware Supra, 535 U.S. at 238-239.

Considering the Chancellor's knowledge of the law in the cases cited above, he could have applied only the rules of Civil Procedure to find in Petitioners favor. However, the Chancellor chose to review the entire record, and has determined Petitioner's Petition for Review was arbitrarily and capriciously denied.

In applying the Civil Rules of Procedure which states:

> "Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damages are admitted when not denied in the responsive pleadings."

The Board failed to deny any of the averments stated in the Petition of Petitioner.

The Petition was apart of the stipulated record. The Rules Governing Admission to the Mississippi State Bar require that complaining applicant file a petition, Rule XII, Section 3. The rules, also require an answer to the petition be served upon the Applicant by the Honorable Board of Bar Admissions when the petition is appealed to the respective Chancery Court of proper jurisdiction, (Rule XII, Section 3).

The Petition was accompanied by a twenty-two page Memorandum that

pointed out the three specified areas that were substantially misgraded, Appendix 90a.

The Memorandum also pointed out how the grades awarded were unjustified due to the merits of the answer, thus resulting in the arbitrary and capricious denial of Petitioner's Petition for Review.

In accordance with the Mississippi Rules of Civil Procedure cited as Rule 8(2)(d) each and every averment regarding the arbitrary and capricious denial in the Petition for Review were admitted, since no answer was filed by the Board.

The Board failed to deny any averments contained in the record

when they made the decision not to file an answer to the Petition or serve an answer upon the Petitioner, as is required by the Rules Governing Admission to the Mississippi State Bar, Rule XII, Section 3, which states:

> "The Board must within thirty (30) days after the applicant's appeal is filed in Chancery Court, or within such further time as the Court may grant, file with the Court and serve upon serve upon the applicant an answer. The Board shall therewith forward to the Court applicant's petition together with copies of examination question (excluding the MBE), model answers or other analyses used in grading the examination and the original of applicant's answer."

THE STATE SUPREME COURTS ANALYSIS OF THE BAR EXAMINATION

The Rules Govening Admission to the Mississippi State Bar provide that the Bar examination shall not be regraded. The opinion does not comply with this rule. In fact the State Supreme Court felt so uncomfortable with the model answer provided by their own appointees, that they changed the model answer in the area of wills and estates. The Court states:

> "The question rather obviously calls for a discussion of the problem of undue influence in procuring a testator's will."

The State Supreme Court cites, In

re: Wills and Estate of Varvaris, 477 So. 2d. 273 (Miss. 1985), to support their position. If the appointees for the State Supreme Court wanted this case considered, they had ample opportunity to put forth this case, into the record before the Chancellor. However, with a reading of the model answer, it is apparent that the case cited, had very little relationship to the facts of the question.

In fact the model answer is in opposition to the position that the State Supreme Court used for its rational in determining that:

> "any applicant should have been put on notice that the presumption arising from confidential

> relationship should have been discussed", Appendix 34a.

The model answer states in regard to the existance of confidential relationship that:

> "There is not much evidence in the question to go on, but from the fact that Antionio was disinherited in the distant past would be somewhat probative that the two were not close..." Appendix 145a.

The model answer further states:

> "If the Chancellor does, however, rule that the presumption does arise. (perhaps from hearing testimony not in this question...)" Appendix 145a.

This model answer itself provides grounds for determining that the Board's denial of the Petition for

Review was arbitrary and capricious. Appendix 143a.

Finally the Rules Governing Admission to the Mississippi State Bar provide.

> "The grounds of appeal shall be limited to those specified in the Applicant's Petition for Review before the Board"
> (Rule XII, Section 2)

Therefore the State Supreme Courts discussion of issues not the subject of the Petition for Review, and the regrading of thoses issues by the State Supreme Court, are direct rule violations, and should not be considered in evaluating this case. The Petitioner has not made any claim

that the subjectiveness of the grading system is unfair, when all parties comply with the Rules of Admission.

The Applicant can obtain a passing score through two avenues. The first avenue available is to receive points for identifying and discussing issues contained in the model answer. However, this is based on the assumption that the model answer contains all of the issues and correct responses thereto.

If the Petitioner can show that he formulated answers that the model answer should have contained then the Petitoner is allowed,

pursuant to the Rules of Admission, to challenge the correctness of the model answer. The Applciant is allowed to focus on areas that can be supported by proof submitted in the form of a Petition for Review and Memorandum.

The issues contained in the Petition for Review and Memorandum speak only to the objective nature of the appeal allowed to be taken to the Chancery Court of proper jurisdiction. The Board can, of course, file an answer to those objective areas. In this case the Board has not offered any proof to the Chancery Court or filed an answer

to the Chancery Court which would overcome Petitioner's allegations in his Petition.

CONCLUSION

The issues presented in this case are of great importance, with respect to the due process requirements under the United States Constitution, governing future decisions in this and other circuits. Petitioner asks this Court to grant the Petition and to reverse the judgment of the State Supreme Court and enforce the Order of the

appellate court of proper jurisdiction for the reasons stated herein.

Respectfully Submitted,

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APPENDIX

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This is to advise you that the Mississippi Supreme Court rendered the following decision on the 29th Day of May, 1991.

Supreme Court Case #90-CA-0130

Trial Court Case #30450

Mississippi Board of Bar Admissions
vs.
Applicant F

Miotion for Non-Publication of Decision Denied. Opinion modified to

delete name of appelle and substitute fictitious name. Banks and McRae, JJ., Not Participating according to Supreme Court Internal Rules.

Petition for Rehearing Denied. Hawkins, P.J., Dan Lee, P.J., and Pittman, J., Dessent. Banks and McRae, J.J., Not Participating according to Supreme Court Internal Rules.

Supreme Court Clerk

lwp

ccs: Samac S. Richardson

IN THE SUPREME COURT OF MISSISSIPPI

NO. 90-CA-0130

MISSISSIPPI BOARD OF A BAR ADMISSIONS

VS.

APPLICANT F

EN BANC

ROBERTSON, JUSTICE, FOR THE COURT

I.

Today's appellant failed the Mississippi bar examination. He claims he has been treated unfairly and presents important questions concerning the administration of the examination and, more particularly, regarding the scope of judicial

review of the Mississippi Board of Bar Admissions' final grading decisions. The Chancery Court considered the matter and granted relief.

We have reviewed the matter and find nothing in the action the Board took with respect to appellant's examination answers which may be fairly characterized as arbitrary, capricious or malicious. We reverse and reinstate the order of the Board.

II.

Applicant F is an adult resident citizen of Rankin County, Mississippi. In February of 1989,

Applicant F sat for the Mississippi Bar Examination (hereinafter "the bar exam").

The Mississippi Board of Bar Admissions (hereinafter "the Board" is a political creature of the state. The Board has nine member who are members in good standing of the Mississippi State Bar. The members serve under appointment of the Justices of this Court. Miss. Code Ann. Section 73-3-2 (1989 Recompiled). We have conferred upon the Board the power to promulgate the necessary rules for the administration of their duties, subject to the approval of the Chief

Justice.

The Board has a carefully drawn procedure for grading the examinations and initially assigned Applicant F a net grade of 68, two points below the minimum score of 70 required for admission. Board rules rendered Applicant F eligible for an automatic re-grade, and, upon completion of this process, Applicant F's overall score was adjusted to 69.3, still below the required score of 70. Applicant F was notified that he did not pass the bar exam.

Applicant F timely filed with the Board a petition for review, see

Rule XI,1 Rules Governing Admission To The Mississippi State Bar (1979, as amended).

In his petition, Applicant F attacked the grading of his examination in three areas: (1) wills and estates, (2) domestic relations, and (3) workers' compensation. On June 23, 1989, the Board denied Applicant F's petition, certifying once again that his examination answers failed to yield a passing score.

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1 Unless otherwise indicated, hereafter all references to provisions of the Rules Governing Admission To The Mississippi State Bar will simply be referred to as "Rule__."

On October 4, 1989, Applicant F commenced the present proceedings for judicial review by filing in the Chancery Court of Rankin County, Mississippi, a petition he mislabeled "Complaint."2 Rule XII, Section 1.

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2 Inexplicably, Applicant F's principal argument in his brief on this appeal is that the Board has "complaint." Applicant F appears of the impression that his action in the Chancery Court of Rankin County was an original civil action subject to the Mississippi Rules of Civil Procedure. Because the Board did not file an answer, under Rule 8(2)(d), Miss.R.Civ.P., Applicant F says his complaint should be taken as admitted. To be sure, the Chancery Court has subject matter jurisdiction of Applicant F's claim. Gill v. Mississippi Department of Wildlife Conservation, ____ So.2d ____, ____

(Miss. No. 07-CC-59222, decided December 12, 1990) (not yet reported). Applicant F's application, however, was in the nature of a petition for judicial review of an administration action. The Chancery Court was sitting as an appellate court. The Board's failure to file a Rule 8 answer was of no moment.

On November 21, 1989, the Chancery Court released an opinion purportedly relying upon Rule XII, Section 2, holding that the Board's denial of Applicant F's petition for review was "arbitrary or capricious in the three specified areas, "to-wit: wills and estates, domestic relations, and workers' compensation. On December 7, 1989, the Chancery Court ordered that the Board immediately issued to

Applicant F a proper certificate of admission which would in turn render him eligible for admission to the practice of law in the State of Mississippi upon presentation of petition to Chancery Court.

The Board filed timely notice of appeal to this Court, and we stayed the Chancery Court's order pending our review.

III.

The Constitution has established this Court as the highest court of this state and has vested in it judicial power, Miss. Const. Art. 6, Section 144 (1980). The Constitution thus vests in this Court

authority to regulate the professional behavior of those officers of the Court commonly called lawyers. We have repeatedly recognized this inherent constitutional power in the context of proceedings for the discipline, suspension and ultimately disbarment of lawyers. **Mississippi State Bar v. Phillips**, 385 So.2d 943, 944 (Miss. 1980); **Matter of Mississippi State Bar**, 361 So 2d 503, 505 (Miss. 1978). It is far too late to question that this authority exists independent of statute. **See, e.g., In Re Fox**, 296 So.2d 701, 702-04 (Miss. 1974); **Ex Parte**

Cashin, 128 Miss. 224, 232-34, 90 So 850, 851-52 (Miss. 1922). All have consistently regarded statutory supplementation to enhance, not limit, the Court's constitutional powers. **Levi v. Mississippi State Bar**, 436 So.2d 781, 783 (Miss. 1983).

As this Court has power to adjudge fitness of persons to practice law through disciplinary processes, it follows on principle that we may address unfitness on the front end, at the time the individual applies for admission to practice. This state's legislature has recognized this constitutional power

in its unequivocal declaration that

> The power to admit persons to practice as attorney in the courts of this state is vested exclusively in the Supreme Court of Mississippi.

Miss. Code Ann. Section 73-3-2 (1989, Recompiled). We implemented that power on November 26, 1979, with our order adopting the Rules Governing Admission To The Mississippi State Bar, rules which have been supplemented and amended from time to time thereafter.

It is true that we have no statute or rule expressly providing for an appeal such as the Board takes from the Chancery Court's order of December 7, 1989. This has been a concern in the past, in other

contexts and stages of procedures for disbarment, but we have never regarded it an impediment to judicial exercise of the constitutional power and responsibility to regulate the lawyers appearing before the courts. See Ex Parte Cashin, 128 Miss. 224, 232, 90 So. 850, 851 (1922). If additional authority were needed--which it is not--we need only refer to the statute which vests in this Court authority to

> ...hear and determine all manner of pleas, plaints, motions, causes, and criminal...which may be brought before it, and which shall be cognizable in said court;...

Miss. Code Ann. Section 9-3-9 (Supp. 1990). This Court's rules serve as

the procedural vehicle for appeals such as this, and we might add from our review of the record that the parties seem to have traversed these without inordinate difficulty. See Miss. Supp. Ct. Rules (1988).

IV.

A word on our scope of review. Our function this day is like that of a licensing agency. In the context of the regulatory boards and admitting authorities with respect to other professions, relief on judicial review is limited to those instances where the authorities have acted arbitrarily and capriciously. See,

e.g., **State Board of Psychological Examiners v. Coxe**, 355 So.2d 669, 671 (Miss. 1978). In the case of lawyers, and particularly in the context of dicipline and disbarment proceedings, we have--by way of contrast--exercised our constitutional powers through a regimen of **de novo** review, holding that we sit as the finders of the facts and proceeding **ab initio**. **See, e.g., Goeldner v. Mississippi State Bar Ass'n**, 525 So.2d 403 (Miss. 1988); **Foote v. Mississippi State Bar Ass'n**, 517 So.2d 561 (Miss. 1987); **Myers v. Mississippi State Bar**, 480 So.2d 1080 (Miss. 1985).

In the bar admissions process, we have chosen to exercise our constitutional authority in a different way. We have delegated the examination process to the Board of Bar Admissions. We have provided applicants aggrieved by Board action the procedural vehicle of a petition for review before the Chancery Court of his county. In Rule XII, Section 2, we have directed that

> ...the Chancery Court shall not regrade the examination or substitute its judgment of the merits of the applicant's examination for the decision of the Board.

We followed this directive with a declaration that the Chancery Court

may reverse the Board's decision only if it finds that the Board's refusal to certify the applicant as having passed the Bar examination "was arbitrary, capricious or malicious"--the familiar standard used in judicial review of other administrative licensing decisions in this state. **Melody Manor Convalescent Center v. Mississippi State Department of Health**, 546 So.2d 972, 974 (Miss. 1989); **Mainstream Savings & Loan Ass'n v. Washington Federal Savings and Loan Ass'n**, 325 So.2d 902, 903 (Miss. 1976).

Of course, our review of the

action of the Chancery Court is de novo. When we say this, we accept the same limitation upon our own review of Board action. That there be no doubt hereafter, this Court will vacate or modify the Board's bar exam format examination covering six subjects (contracts, torts, criminal law, constitutional law, real property, and evidence). The MBE is prepared by the National Conference of Bar Examiners and is administered and given under the auspices of American College Testing Service. The MBE is weighted at 40 percent of the total score.

Prior to the state essay

examination, the members of the Board exchange their proposed questions and grading analyses. At least two Board members review each such question before it is administered.

Following the examination, each examination answer booklet is coded and the grading process begins. the entire grading and regrading process, including any petitions for review, is conducted in anonymity; that is, examiners and/or graders do not know the identity of the person whose answer they are grading. Once all state essay examinations have been graded, the examination scores are integrated with scores on the

subjective MEE examination and the objective MBE examination. All scores are adjusted statistically to insure consistency between different administrations. The process of adjusting insures that a score of 70.0 on each administration is equivalent to a score of 70.0 on the average of the six most recent Mississippi Bar Examinations.

There is an automatic regrading process for marginal failures. All essay examinations of applicants initially scoring between 68.0 and 69.9 are regraded by another member of the Board, who had been involved

in the review of the questions at the pre-examination stage. This is done before any scores are released. As an example, the examiner responsible for the torts essay question on a particular examination may have as his "swap partner" the examiner responsible for the contracts essay question on the same examination. These partners review each other's examination questions prior to the examination for clarity, fairness and appropriateness. Likewise, when an applicant falls in the automatic regrade category, the "swap partners" exchange the essay examination answer written so the applicant's

examination is regraded by an examiner different from the one who initially graded his examination. The regrading process is done on a "blind" basis, where the second grader is not aware of the initial grade. If the regrader awards a higher score than the initial grader, the applicant receives the average of the two grades. If the regrader awards a lower grade, the initial score on the examination is taken as the final grade. The procedure insures that this "borderline reappraisal" can only benefit the applicant.

The grading process takes approximately thirty days, after which all scores are compiled and calculated by computer to determine an applicant's final score. Only after all grading is completed are the applicants' code number matched with their applicant numbers and the identities of the passing and failing applicants determined. All failing applicants are furnished with detailed report of their preformance on all parts of the examination. After results are released, unsuccessful applicants then have a period of thirty days in which they can request copies of questions of

their answers and the analyses that were used in grading the essay examinations.

Prior to each Bar examination, the Board Chairman appoints a Review Committee of not less than three members of the Board. That three-member Review Committee receives all petitions for review, such as that Applicant F has filed. The identities of the petitioners are not known to the Review Committee. Each member of the Review Committee reviews each question that the applicant contends was substantially misgraded. The Review Committee's standard of review is controlled by

Rule XI, Section 4, to-wit: is there any clear and manifest evidence that applicants' papers were substantially misgraded to an extent that the examination result as a whole may be affected. The Review Committee determines if the examiner preparing that particular examination question made some clear error of law and the applicant's response may be correct or that the model answer may possibly be wrong. It is not the function of the Review Committee to determine a small point increase or decrease in the applicant's core; rather, the Review Committee determines if there is manifest error in the grading.

IV.

Applicant F sat for the Mississippi Bar examination in February, 1989. He achieved a score of 134 on the MBE portion of the Bar exam, which coverted to a score of 71.5 on a 0 to 100 point range. On the MEE portion of the Bar exam, he achieved a score of 70.0. On the Mississippi essay portion of the Bar exam Applicant F's score was 67.9. These final essay scores were scaled and resulted in Applicant F's overall score of 69.3 These final essay scores were the result of the regrade. Applicant F's initial score was 68.0, which placed him in

the range for an automatic regrade of all his essay examinations. Pursuant to Board procedures, an applicant whose combined score falls in the automatic regrade category can never be given a score less than his initial score following the regrade.

We have examined Applicant F's score sheets, both pre- and post-regrade. It is noteworthy that Applicant F received 45 points on his Mississippi essay question on Wills and Estates and Domestic Relations on the initial grading by the examiner. The examiner who regraded Applicant F's Wills and Estates and Domestic Relations answer gave him only 24

points! As stated above, Board rules prohibited awarding Applicant F a lower score on regrade than on the initial grade. Applicant F thus retained his score of 45 points even after a regrade. Also noteworthy are Applicant F's scores on Torts and Evidence/Discovery essay questions, which, on the regrade, resulted in a substantial decrease in his score. Again, due to the Board's policy, Applicant F retained his original higher score on these essay questions.

When his Worker's Compensation question was regraded, Applicant F gained an additional single point,

moving form 60 to 61 points. When an applicant's examination is regraded and he is awarded more points on the regrade than the original score, then the regraded score and the original score are averaged to produce the score awarded to the applicant. When his original grade of 60 and his regrade score of 61 are averaged, the result is 60.5, which was rounded up by the Board, resulting in a regraded score of 61. When examined in this light, it can only be said that the Board of Bar Admissions has been exceedingly fair not only to Applicant F, but to all applicants whose scores fall in the automatic

regrade category.

VII.

A.

Applicant F's Principal challenge is that the examiners failed to provide adequate instructions regarding the examination, and that this fact, coupled with the questions themselves, substantially misled him. Of importance, we find among the general instructions given all applicants:

> Each answer should show an understanding of the facts, a recognition of the issues involved, the principles of law applicable and the reasoning employed to reached the

> conclusion. Question are intended to be inquiries on fundamental points of law on each subject. Do not search for hidden meanings, "catches" or remote exceptions since none are intended.

Applicant F's answers largely ignored these general instructions, as will presently be apparent.

B.

Applicant F argues that, with respect to the Wills and Estates section, the Board's action in grading his answer and in denying his petition for review was arbitrary and capricious. The Chancery Court conclusorily so found.

The question is one loosely

drawn from the facts and circumstances of this Court's decision **In Re Will and Estate of Vavaris**, 477 So.2d 273 (Miss. 1985). The facts situation begins with

> Raphael Gabrielle, a resident of Jackson, originally from Verona, Italy, makes a will in 1973...

Gabrielle is also assumed to own property in Italy. Applicant F argues that this reference to nationality was misleading and that it should not have been included in the question. The point escapes us. The questions and instructions make clear that an original will was made in Mississippi. The examinee is asked to decide whether a second will, also

made in Mississippi, should be admitted to probate. We do not see how any competent examinee could be misled by Gabrielle's Italian connection.

The question rather obviously calls for a discussion of the problem of undue influence in procuring a testator's will. The fact that a son was deeply involved in the making of the latter will which left him virtually all of the testator's estate should have been sufficient to have put any applicant on notice that the presumption arising from a confidential relationship should have been discussed. Applicant F failed

to spot the problems inherent with the legatee's lawyer drawing the will and with the legatee's wife witnessing the will in the law office. Applicant F's cursory answer is "the issue of undue influence could be raised, but there seems to be none..." Examination instructions direct that the examinee discuss " the principles of law applicable and the reasoning employed to reached a conclusion." Suffice it to say that Applicant F's answer does not even come close to doing this.

There are other errors in Applicant F's answer. He writes that, if the first will were allowed

to remain in effect, the two sons would be entitled to:

> ...elect outside the Will and take a share in proportion, as if there were no will at all in this case each son would take a 1/2 interest in the estate.

This is patently incorrect. Apparently, Applicant F confused the right of a spouse to elect against the will. Children have no such right of election, and the children would have taken according to its terms.

Next, Applicant F, after discussing the requirements for executing a valid will, states that since the first will was not revoked by physical act, and the second will did not say that it revoked the first

will, "the two wills would be read together," completely ignoring the obvious fact that the terms of the second will were completely inconsistent with the terms of the first will and, therefore, revoked it by implication if not expressly.

We find nothing arbitrary and capricious in the Board's judgment that Applicant F did not pass the Wills and Estate section of the examination.

C.

Applicant F challenges the grading of his answer to the Domestic Relations question. The first part concerns and irreconcilable

difference divorce in which the wife was not represented by an attorney but relied on her husband's attorney. The question asks for a discussion of the wife's remedies where the husband breached the court-approved property settlement agreement. The question rather obviously calls for a discussion of the wife's remedies against the husband by reason of his arguably fraudulent conduct. Applicant F has little to say about this but instead talks of the wife suing the husband's attorney for legal malpractice. Applicant F's answer mentions a motion filed with the Chancery Court to modify, without

a discussion of underlying reasons, and then lapese into an enumeration of the thirteen grounds for divorce in Mississippi, which clearly have nothing to do with the question.

Even if Applicant F were given most of the 25 points allowed on the first part of the Domestic Relations question, he almost completely misses the boat on the second part, where the issue of jurisdiction under the Uniform Child Custody Jurisdiction Act is prominent. Applicant F show familiarity only with the name of the UCCJA, as he states that the husband, who lives in the state which granted the divorce, can "obtain some help in

getting a hearing and some visitation" from the Act, when under the facts of the question, the wife, living in Florida, is the one making use of the Act. **See Walker v. Luckey**, 474 So.2d 608 (Miss. 1985). He fails to state that under the Act, the state that is the home state of the child has jurisdiction to make child custody determination. In addition, Applicant F omits any discussion of the procedure required by the Act, the principal one being that the two courts, upon being informed that litigation is proceeding in the other, are required to communicate with one another to

ascertain the more appropriate forum.

He also states that the wife is in contempt of court and must go into the jurisdiction where she obtained her divorce to get a modification, thus ignoring the fact that she was proceeding under that Act as the only possible vehicle for litigating custody in a foreign jurisdiction. The Domestic Relations question was not substantially misgraded; rather, it was substantially "mis-answered." There is nothing arbitrary or capricious in the Board's decision that Applicant F flunked Domestic Relations.

D.

Applicant F finally challenges the Workers's Compensation portion of the examination. Applicant F claims that his troubles with the question were a result of a lack of specific instructions. While a simple reading of the instructions on the question bears this assertion false, it should also be noted that Applicant F actually successfully identified five of the six major issue groups in the question. He failed to discuss "the principles of law applicable and the reasoning employed to reach the conclusion." Applicant F simply answered the question poorly,

suggesting lack of grasp of the subject matter. We find no arbitrariness nor caprice attending the Board's decision.

VIII.

Inherent in Applicant F's appeal is an attack upon the subjectivity of the grading process. Such challenges have been made in other states and repeatedly rejected. **See, e.g., Dinger v. State Bar Board**, 312 N.W.2d 15 (N.D. 1981); **Whitfield v. Illinois Board of Law Examiners**, 504 F.2d 474 (7th Cir. 1974); **McGinn v. State Bar Board**, 399 N.W.2d 864 (N.D. 1987). Tyler

v. Vickery, 517 F.2d 1089 (5th Cir.1975), is a most cited case concerning essay type bar examination questions. In Tyler the Court of Appeals stated

> The relevant question must then be whether the passing of an examination made up of subjective, essay-type questions has a rational connection with the applicant's ability to practice law in the State of Georgia. It is beyond question that it does. While a Plaintiff would apparently favor a more objective type of examination, much of an attorney's actual work once admitted into practice involves the analysis of complicated fact situations and the application thereto of abstract legal principles. Both in legal problem presented and well-reasoned explication of the relevant considerations

is of utmost importance.

Tyler, 517 F.2d at 1102.

The Court of Appeals also went on to defend a regrading procedure similar to that used in Mississippi and held:

> Indeed, it is curious logic to condemn the examiners for utilizing practices designed to recognize the inherent limitations of testing and for attempting to give the benefit of the doubt to applicants who may have been adversely affected by those limitations. Similarly, we see no infirmity in the fact that the standards for determining which papers are to be regraded are not fixed and immutable and may depend in part upon the exercise of an examiner's discretion.

Tyler, 517 F.2d at 1103.

Implicit in Applicant F's appeal to the Chancery Court and in his pleadings filed in this Court is the idea that the courts should regrade his essay examinations--or at least the ones on which he received low grades. The examiners charged with this responsibility are appointed by Justices of this Court. These examiners are distingushed attorneys who are recognized by this Court for their ability and judgment in Bar examinations. Their duties have been summarized by the Supreme Court of Georgia in **Ex Parte Ross**, 197 Ga. 257. 28 S.E.2d 925 (1944), holding that the Board of Bar

Examiners is the exclusive judge of the matter of grading Bar examination papers, and stating:

> The Bar examiners are chosen because of their high character, kinowledge of the law, and experience in practice of the law, and they are made sole and exclusive judges of the matter of grading Bar examination papers.

This Court has nine competent, professionally dedicated lawyers to serve on the Mississippi Board of Bar Admissions. We decline Applicant F's invitation that we usurp their duties and responsibilities by regrading his examination. We find nothing in the process by which Applicant F has been examined that is arbitrary, capricious or malicious, nor in the

Board's consideration of and denial of his petition for review.

REVERSED AND RENDERED.

ROY NOBLE LEE, C.J., PRATHER AND SULLIVAN, JJ., CONCUR. HAWKINS, P.J., DISSENTS WITH WRITTEN OPINION WITH DAN LEE, P.J., CONCURRING IN RESULTS ONLY. PITTMAN, J., DISSENTS WITHOUT WRITTEN OPINION. BANKS AND McRAE, JJ., NOT PARTICIPATING.

IN THE SUPREME COURT OF MISSISSIPPI
NO. 90-CA-0130

MISSISSIPPI BOARD OF BAR ADMISSIONS

V.

APPLICANT F

HAWKINS, PRESIDING JUSTICE,
DISSENTING:

I respectfully dissent.

I would have no quarrel with the majority view if this case were properly before us on merits. I am familiar with this record, the examination given Applicant F, and his answers.

My problem with the majority is that there is no statute or rule of

this Court, none, giving this Court the authority to hear this appeal. We do not have jurisdiction, and should concede this.

Effective November 1, 1979, this Court adopted the Rules Govening Admission to the Mississippi State Bar (BR). Contrary to many other rules which have proliferated out of this Court, these Rules are specifically authorized by statute. Miss. Code Ann. Section 736-3-2 (1) states:

> (1) Power to Admit Persons to Practice. The power to admit persons to practice as

> attorneys in the courts of this state is vested exclusively in the Supreme Court of Mississippi. (Emphasis added)

Therefore, I have no question in this case but that this Court is lawfully empowered to promulgate all rules pertaining to bar admission. There have been cases where I have questioned this Court's rule making assertions, Hall v. State, 539 So.2d 1338, 1348 (Miss. 1989) (Hawkins, P.J., Dissenting); City of Mound Bayou v. Johnson, 562 So.2d 1212, 1220 (Miss. 1990) (Hawkins, P.J., dissenting); but no such questions can be raised as to

our rule-making power dealing with bar admissions.

Rule XII of the Bar Rules states in full:

RULE XII. APPEAL FRON BOARD'S FINAL DETERMINATION

Section 1. Right to Appeal

A failing applicant who has filed a Petition for Review as provided in Rule XI shall have the right to appeal from the order of the Board denying his Petition to the Chancery Court of the county of his residence within six (6) months of receipt of notice of such order. (Emphasis added)

Section 2. Standard of Review

The grounds of appeal shall be limited to those specified in the applicant's Petition for Review before the Board. The Chancery Court shall not regrade the examination or substitute its judgment of the merits of the applicant's examination for the decision of the Board. The Board's decision to fail an applicant shall be reversed by the Chancery Court only if the applicant proves b;y a preponderance of the evidence that the Board's denial of his Petition was arbitrary, capricious or malicious.

Section 3. Record on Appeal

The Board must within thirty (30) days after the aplicant's appeal is filed in Chancery Court or within such further time as the court may grant, file with the Court and serve upon the applicant an answer. The Board shall therewith forward to the Court applicant's Petition together with copies of examination questions (excluding the MBE), model answers or other analyses used in grading the examination, and the original of applicant's answers.

This is the only rule dealing with any appeal from the Bar Board's decision. Clearly, the only appeal

authorized by Rule XII is an appeal by a failing applicant to the chancery court of the county of his residence.

Beyond this, is there any statute governing appeals from a Bar Admission Board's decision? The final sentence of Miss. Code Ann. Section 73-3-2 (6) states:

> The applicant shall have the right to appeal from this order (denying him admission to bar) to the chancery court of the county of his residence within six (6) months of receipt of notice of such order.

The chancery court proceeding in this case was a "judicial review of

an administrative action. The chancery court was sitting as an appellate court."
(Majority Opinion, p.2, footnote 2)
This case in turn is before us as an appellate review of the chancellor's decision. (Majority Opinion, p.3)

Unitl the last few years, appeals to this Court could only be authorized by statute. **Sanford v. Bd. Supervisors, Covington Co.**, 421 So.2d 488, 490-491 (Miss. 1982). Even now, at least until the majority just spoke in this case, there could be no appeal to this Court unless authorized by a statute or rule of this Court, or both. See

authoritites cited in **City of Mound Bayou v. Johnson**, 562 So.2d at 1220. We are an appellate court. This case is before us on an appeal from an appellate decision by; a chancery court. The only possible way we can have authority to hear this appeal is for some statute, or at the very least, some rule of this Court to authorize it. And there is none.

My problem with the majority is that by hocus-pocus verbiage, a mixing of apples and oranges, it treats our indisputable authority to admit, disbar or discipline attorneys in the practice of law as an authority to hear this case on this

particular appeal. Now, the majority might wish we had the authority, and it might be well and good if we had made provision by rule for appeal to this Court. Unfortunately for the majority there is no such rule or statute authorizing this appeal by the Bar Admission Board from the chancery court.

The majority tells us that we have the authority to address the unfitness of a person to practice law at the front end. No one disputes that, or that the power has been vested by the Legislature exclusively in this Court. This is not the

question. The question here is our authority to hear this appeal.

The only authority the majority cites to hear this appeal cannot survive the most cursory of examination. **Ex Parte Cashin**, 128 Miss. 224, 232, 90 So. 850, 851 (1922), is simply authority for the proposition that a court of general juirisdiction in this State has authority to proceed by original jurisdiction to discipline or disbar an attorney. Indeed, this Court has held it, too, has original jurisdiction to discipline or disbar an attorney. **In re Marshall**, 160 Miss. 874, 134 So. 67 (1931).

All lawyers' professional fitness and professional conduct are proper subject for investigation by this Court. If this Court saw fit to take some action relative to Applicant F's qualification to practice law, it has the unquestionable authority to do so. This is not the question. The question is our authority to hear this particular appeal, and there is none. The majority grabs it out of thin air.

The remaining authority the majority cites is Miss. Code Ann. Section 9-3-9 (Supp. 1990). The majority fails to quote the entire paragraph:

9-3-9. Jurisdiction of the court.

> The supreme court shall have such jurisdiction as properly belongs to a court of appeals, and shall hear and determine all manner of pleas, plaints, motions, causes, and controversies, civil and criminal, which are now pending therein, or which may be brought before it, and which shall be cognizable in said court; but a cause shall not be removed into said court until after final judgment in the court below, except in cases particularly provided for by law; and the supreme court may grant new trials and correct errors of the circuit court in granting or refusing the same. (Emphasis added)

> Provided, however, the supreme court shall have such original and appellate jurisdiction as may be otherwise provided by law in cases and proceedings for modification of any rates charged or sought to be charged to the public by any public utility.

First, the statute only gives this Court such jurisdiction "as properly belongs to a court of appeals." Second, we can only hear cases which are "cognizable" before us on this appeal begs the very question. Is it indeed? Of course, with no checks or balances whatever, if the majority chooses to say so, then that makes it so. And the majority says so.

Finally, the statute says we will only hear appeals "particullary provided for by law." The majority creates a singularity of marelous proportion in asserting this statute grants unto us authority to hear this appeal. In sum, though the majority may assail us with sophistry, the frozen truth remains that the only authority the majority has to hear this appeal -- like Lamb's **Dream Children** -- exists only in the heads of the majority.

In fact, I do not know why the majority does not go ahead and simply say that because we have authority to

admit lawyers to practice and to disciple them, **ipso fact**, we have the inherent power to hear this appeal. It would be wrong, but at least it would be straightforward. Spare us the additional assault upon our intelligence.

The majority makes its own rules as we go along.

I have a simple hang-up that we should honor established precedent, the statutes and our rules.

DAN LEE, P.J., CONCURS IN RESULT ONLY.

IN THE CHANCERY COURT OF
RANKIN COUNTY, MISSISSIPPI

CRISTOPHER JOEL ZEBERT PLAINTIFF

V. NO. 30,450

THE HONORABLE BOARD OF
BAR ADMISSIONS OF THE
STATE OF MISSISSIPPI DEFENDANTS

AGREED ORDER

COMES NOW the Petitioner and the Mississippi Board of Bar Commissioner, by the through counsel, and agree as follow, to-wit:

That the Complaint filed herein be amended to reflect that the above styled and numbered cause be considered by the Court, on appellate review, as an appeal in accordance with Rule XII of the Rules Governing

Admission to the Mississippi State Bar, and that the record appealed from shall consist of the following:

A) The Petition for Review filed with the Mississippi State Board of Bar Admissions;

B) Copies of examination questions excluding the multi-state bar examination;

C) Model answers or other analyses used in grading the examination.

D) The original of the Petitioner's answers.

Counsel for the parties shall submit briefs in accordance with the schedule to be set by the Court

SO ORDERED THIS THE 1ST day of November, 1989.

Billy G. Bridges
CHANCELLOR

Agreed & Approved:

CRAIG E. BRASFIELD
For the Board of Bar Admissions

SAMAC S. RICHARDSON
For the Petitioner

IN THE CHANCERY COURT OF
RANKIN COUNTY, MISSISSIPPI

CRISTOPHER JOEL ZEBERT

APPELLANT

VS. NO. 30,450

THE HONORABLE BOARD OF
BAR ADMISSIONS OF THE
STATE OF MISSISSIPPI

APPELLEE

OPINION OF THE COURT AND
FINDING OF FACT

THIS CAUSE having come to this Court as an appeal from a denial of a Petition for Review in accordance with Rule XII of the Rules Governing Admission to the Mississippi State Bar, and the Court having carefully considered and reviewed the Court file, finds as follows:

I.

That this Court has appellate

review authority, jurisdiction and venue of this matter; said appeal having been perfected and filed on the 4th day of October, 1989.

II.

That by Sitpulation, dated the 6th day of November, 1989, counsel for the said Cristopher Joel Zebert and counsel for The Board of Bar Admissions of the State of Mississippi stipulated to the contents of the record for appeal containing those matters which this Court was to consider and review on appeal, said stipulation being as follows:

1. The Petition with all memorandum and exhibits filed by

Cristopher J. Zebert;

2. Copies of the questions on wills and estate, domestic relations, and workers' compensation for the February, 1989, Mississippi Bar Exam;

3. Model answers as provided by the Mississippi Board of Bar Admissions for wills and estates, domestic relations, and workers' compensation for the February, 1989, Mississippi Bar Exam;

4. Cristopher J. Zebert's original answers to the questions on the February, 1989, Mississippi Bar Exam as outlined herein;

5. Calculation of scores and all subject areas, including the results of the automatic regrade of

Petitioner's February, 1989, Mississippi Bar Exam.

III.

That Cristopher Joel Zebert met all qualifications to sit for the February, 1989, Bar examination, and, in fact sat for such examination and made a score of 134 on the Mulitstate section of the exam which score satisfied the requirements for the Multistate Section of the test; said minimum passing scaled score being 123.

IV.

The Bar examination required an overall 70 percentile to effect a passing score and the Appellant's final scaled overall score reflected

a 69.3 percentile, which was .7 of one point less than a passing score.

V.

Pursuant to the Mississippi Rules of Civil Procedure, Rule XII Section 2, Standard of Review, wherein it sets out this Court's standard when it states the following:

> "The grounds of appeal shall be limited to those specified in the applicant's Petition for Review before the Board. The Chancery Court shall not regrade the examination or substitute its judgment of the merits of the applicant's examination for the decision of the Board. The Board's decision to fail an applicant shall be reversed by the Chancery Court only if the applicant proves by a preponderance of the evidence that the Board's denial of his

Petition was arbitrary, capricious or malicious."

VII.

The issue that is before this Court is whether or not be a preponderance of the evidence presented the Board of Bar Examiner's denial of the original Petition for Review was arbitrary or capricious in the three specified areas.

VIII.

The first area considered was the MSE (1) Wills and Estates portion of the Bar Examination. In considering the stipulated record, the Court finds the denial of the Petition for Review by the Board of Bar Examiners in this area was

arbitrary and capricious.

IX.

The second area considered was the MSE (1) Domestic Relations portions of the Bar Examination. In considering the stipulated record, the Court finds the denial of the Petition for Review by the Board of Bar Examiners in this area was arbitrary and capricious.

X.

The third area considered was the MSE (9) Workmen's Compensation protion of the Bar Examination. In considering the stipulated record, the Court finds the denial of the Petition for Review by the Board of

Bar Examiners in this area arbitrary and capricious.

THE COURT, therefore, reverses said denial by the Board of Bar Admissions. Let an order be drawn in accordance with this Opinion.

SO ORDERED this the 21st day of November, 1989.

Billy G. Bridges
CHANCELLOR

IN THE CHANCERY COURT OF

RANKIN COUNTY, MISSISSIPPI

CRISTOPHER JOEL ZEBERT

APPELLANT

VS. NO. 30,450

THE HONORABLE BOARD OF
BAR ADMISSIONS OF THE
STATE OF MISSISSIPPI

APPELLEE

ORDER

THIS CAUSE having come on as an appeal from the denial of a Petition for Review in accordance with Rule XII of the Rules governing admission to the Mississippi State Bar, and the Court having carefully considered and reviewed the Court file, and the Court having previously rendered an Opinion in this cause, now Order,

That the Board of Bar

Admissions of the State of Mississippi immediately issue to the Appellant, Cristopher Joel Zebert, a Certificate of Admission upon which he can file along with a Petition for Admission in a Chancery Court of proper jurisdiction for the practice of law in the State of Mississippi.

SO ORDERED THIS THE 7TH day of December, 1989.

Billy G. Bridges
CHANCELLOR

Approved as to Form:

Samac S.Richardson
For the Appellant

Craig E. Brasfield
For the Appellee

IN THE CHANCERY COURT OF
RANKIN COUNTY, MISSISSIPPI

CRISTOPHER JOEL ZEBERT

PLAINTIFF

VS. NO. 30,450

THE HONORABLE BOARD OF
BAR ADMISSIONS OF THE
STATE OF MISSISSIPPI

DEFENDANTS

RULING ON APPLICATION FOR
STAY OF JUDGMENT

This cause came on to be heard on the Application for Stay of Judgment filed herein by the Mississippi Board of Bar Admissions, by and through its attorney of record. The Board requested that the Judgment entered in this cause on December 7, 1989 be stayed pending

the appeal to the Supreme Court so that Mr. Zebert could not be issued a certificate to practice law by the Board of Bar Admissions.

After having reviewed the pleadings and arguments of the parties, the Court finds that the request to stay the Judgment entered on December 7, 1989 should be denied.

Let an Order issue in conformity with this ruling.

ORDERED AND ADJUDGED this the 24th day of January, 1990.

Billy G. Bridges
CHANCELLOR

BEFORE THE MISSISSIPPI BOARD OF
BAR ADMISSIONS

IN RE:

CRISTOPHER J. ZEBERT

ORDER

The Petition for Review filed by applicant, Cristopher J. Zebert, concerning his failing result on the February, 1989 bar examination has come before the Mississippi Board of Bar Admissions. In accordance with Rule XI of the Rules Governing Admission to the Mississippi State Bar, said Petition for Review has been referred to a Review Committee. A Review Committee has unanimously found that said applicant did not

achieve a passing score on the Mississippi bar examination under the provisions of Rule IX, Section 9 of the Rules Governing Admission to the Mississippi State Bar and has unanimously recommended to the Board that applicant's petition should be denied. Under the provisions of Rule XI, Section 4, the report of the Review Committee is hereby approved by the Board.

IT IS THEREFORE ORDERED that the Petition for Review of Cristopher Zebert should be and the same is hereby denied and the failing result of Cristopher J. Zebert on the February, 1989 Mississippi bar

examination is hereby affirmed.

SO ORDERED, this the 23rd day of June, 1989.

MISSISSIPPI BOARD OF
BAR ADMISSIONS

BY: JEROME C. HAFTER
Chairman

BEFORE THE HONORABLE BOARD

OF BAR ADMISSIONS

PETITION OF CRISTOPHER J. ZEBERT FOR

A CERTIFICATE OF ADMISSION

CRISTOPHER J. ZEBERT
115 Loyd Street
Pearl, Mississippi 39208
601/939-2932
601/393-3166

IN THE MATTER OF CRISTOPHER J. ZEBERT

PETITION FOR ADMISSION TO THE STATE BAR OF MISSISSIPPI

COMES NOW, the Petitioner, Cristopher J. Zebert, and petitions this Honorable Board of Bar Admissions for a regrading of his examination on which he obtained an overall score of 69.3, and in support thereof would show a substantial misgrading in the following examination areas.

I.

Petitioner would show substantial misgrading on the MSE(1) Wills and Estates portion of the

examination on which the Petitioner obtained a total score of below 75.0 points.

II.

Petitioner would show substantial misgrading on the MSE(1) Domestic Relations portion of the examination on which the Petitioner obtained a total of below 75.0 points.

III.

Petitioner would show sustantial misgrading on the MSE(9) Workmen's Compensation portion of the examination on which the Petitioner obtained a total score of below 75.0 points.

WHEREFORE, in conclusion, Premises Considered, Your Petitioner Prays:

1. That the Petitioner has demonstrated and shown unto the Board of Bar Admissions that he is fit, competent and capable to practice law in the State of Mississippi;

2. That this Honorable Board of Bar Admissions immediately issue unto Petitioner a certificate of admission to practice law in the State of Mississippi;

3. And if your Petitioner has prayed for improper relief or inadequate relief, he now prays for such other, further and more general

relief as this Board might deem proper.

RESPECTFULLY SUBMITTED,

CRISTOPHER J. ZEBERT
115 Loyd Street
Pearl, Mississippi 39208

STATE OF MISSISSIPPI

COUNTY OF RANKIN

PERSONALLY came and appeared before me, the undersigned authority within and for the aforesaid County and State, the within named, CRISTOPHER J. ZEBERT, well known to me, who after having been first duly

sworn by me, states upon his oath that the matters, statements, allegations and averments, and each of them, set forth and contained in the above and foregoing petition are true and correct as therein stated.

_____

CRISTOPHER J. ZEBERT

SWORN TO AND SUBSCRIBED BEFORE ME ON THIS, THE ___ DAY OF _____, 1989.

_____

NOTARY PUBLIC

MY COMMISSION EXPIRES:

_____

EDITORS NOTE:

The exhibits originally contained in the memorandum that follows have not been reproduced. The document is complete within it self, and is supplied to provide a clear understanding of the scope of the Document that was never responded to by the Board of Bar Admissions.

MEMORANDUM

CONTENTS

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MEMORANDUM

TABLE OF AUTHORITY

CASES:

1) Heard, etal v. Drennen

93 Miss. 236, 46 So. 243 (1908)

STATUTES:

1) MISS. CODE ANN. 95-5-1 (1987 Supplement)

ETHICS RULES:

Rule 1.7 (b)

Ethics Opinion No. 80, March 25, 1983

Disciplinary Rules, 5-105(A); 5-105(C)

MISCELLANEOUS:

1) Board of Bar Examiners General Instructions

SYNOPSIS OF MEMORANDUM

Three areas of the Petitioner's Bar Examination were incorrectly graded. This constituted an arbitrary and/or capricious error which resulted in a substantial misgrading of his exam. Therefore, the grade awarded is unjustified by the merits of the answer.

The Wills and Estates portion of the examination was graded in reliance on a question which is fatally flawed. The Examiner could have cured the defect in the question by providing a set of specific instructions, but he neglected to cure the defect. The Petitioner was

forced to rely on the General Instructions supplied by the Board of Bar Examiners in selecting his answer. The Examiner discusses in his Model Answer, an area of law that the General Instructions do not allow. The Petitioner was prevented from discussing this area because the Petitioner followed the General Instructions. The Examiner awarded thirty four points for this discussion. If the Petitioner had received less than one-half of these points, he would have obtained a passing score on the examination. In fact, 16 points would reflect a score change from 69.3 to 70.0266. For

that reason, there is a substantial difference in the Model Answer and the Petitioner's Answer to parts of the Wills and Estates Examination.

On question number one of the Domestic Relations portion of the examination, the Bar Examiner unintentionally based his answers on the view points that ethical considerations do not apply in the area of Domestic Relations law. The Model Answer was prepared with this contention in mind. It allowed for no argument that a Domestic Relations client could institute and maintain a malpractice action against his or her attorney when a violation of the

Mississippi Rules of Professional Conduct has been committed. For that reason, there is a substantial difference in the Model Answer and the Petitioner's Answer to parts of the Domestic Relations Examination.

Finally, Workman's Compensation question number two was drafted without a set of specific instructions which forced the Petitioner to rely on the General Instructions supplied by the Board of Bar Examiners in selecting his answer. The Examiner did not structure the question to gain the response he desired. The Examiner could have supplied a set of specific

instructions, but neglected to do so. For that reason, there is a substantial difference in the Model Answer and the Petitioner's Answer to parts of the Workman's Compensation Examination.

The Memorandum that follows will address each of these issues and provide sufficient documentation to support each contention. The Petitioner thanks this Committee for the opportunity to file and present his Petition for review and memorandum.

MEMORANDUM

WILLS AND ESTATES SYNOPSIS:

The Bar Examiner graded the

examination in reliance on a question which is fatally flawed. The Examiner did not structure the question to gain the response he desired. The Examiner could have cured the defect in the question by providing a set of specific instructions, but he NEGLECTED to cure the defect. The Petitioner was forced to rely on the General Instructions supplied by the Board of Bar Examiners in selecting his answer. For that reason, the Bar Examiner's Model Answers constitute an arbitrary and/or capricious error which resulted in a substantial misgrading of the Petitioner's

examination. Therefore, the grade awarded is unjustified by the merits of the answer.

DISCUSSION OF WILLS AND ESTATES EXAMINATION

A review of the question in its final form shows that the Bar Examiner structured a fatally flawed question. In paragraph one, the first sentence, which reads as follows:

"Rafael Gabrielli, a resident of Jackson, orignally from Verona, Italy, makes a will in 1973, in which he leaves all his possessions to his daughter, Angela, completely disinheriting his sons, Antonio and

Michael, the latter of which ran away from home and has not been heard from for many years." (See Exhibit #1 for full text.)

The Examiner did not structure the question to gain the response he desired. By developing the question in such a manner, the Examiner emphasizes the nationality as well as the place of birth of Rafael Gabrielli. If his national origin was not to be an issue, it should not have been included in the body of the question. By including this information, his national origin and the jurisdiction in which Will preparation occurred became an issue

that necessitated discussion. This sentence states that Rafael Gabrielli is a resident of Jackson, but originally from Italy. However, the question does not indicate whether Rafael was a citizen of the United States or Italy during the time that the Will was prepared. The Petitioner responded to these facts by stating that there is a jurisdictional issue, and more specifically a conflict of laws problem. (See Exhibit #2 for full text.) The Petitioner responded in this manner because if the Will in question were formed in Italy under Italian law requirements, this would

necessitate a discussion of how the Laws of Mississippi would treat such a Will. The Petitioner contends that his analysis is logical and correct.

The Petitioner's next step in his analysis was to state the requirements for a valid will under the Laws of the State of Mississippi in this case, since where the Will was formed had been brought to issue in the examination. The Petitioner stated these requirements as follows:

"In order to have a valid will in this case, the Testator needs to be of sound mind IE, know the objects of his bounty and know what his property (is). The Will needs to be

in writing and signed by the Testator or by someone else in his presence or by his direction and it needs to be witnessed by two competent witnesses who witness the acknowledgement of the signature." (See Exhibit #2 for full text.)

The Mississippi Code of 1972 Annotated MISS. CODE ANN. § 95-5-1 (1987 Supplement) stated the requirements in the following manner:

"Every person eighteen (18) years of age or older, being of sound and disposing mind, shall have power, by last will and testament, or codicil in writing, to devise all the estate, right, title and interest in

possession, reversion, or remainder, which he or she hath, or at the time of his or her death shall have, of, in, or to lands, tenements, hereditaments, or annuities, or rents charged upon or issuing out of them, or goods and chattels, and personal estate of any description whatever, provided such last will and testament, or codicil, be signed by the testator or testatrix, or by some other person in his or her presence and by his or her express direction. Moreover, if not wholly written and subscribed by himself or herself, it shall be attested by two (2) or more credible witnesses in the presence of

the testator or testatrix."

The Petitioner admits he omitted the eighteen years of age requirement. He made the assumption that Rafael was over the age of eighteen in 1973 due to the fact that he was the Father of three children and had made a call (from a nursing home) to one of his children. (See Exhibit #2 for full text.)

The Petitioner's discussion of the preceeding issue was necessary due to the fact that the question does not state whether the Will was formed in the United States or Italy or even Mississippi. (See Exhibit #1 for full text.)

The Petitioner contends that the issue of what law governs a foreign Will in this State is not viewed lightly. As early as 1908, the Mississippi Supreme Court in Heard, etal v. Drennen. 93 Miss 236, 46 So. 243 (1908) held that all rights derived through a foreign Will, insofar as it affects property situated in this state, are governed by Mississippi Laws. 46 So. 244.

With these points established, the Petitioner wishes to state that the Bar Examiner's Model Answers constitute an arbitrary and/or capricious error which resulted in a substantial misgrading of the

examination. Therefore, the grade awarded is unjustified by the merits of the answer.

The Petitioner would further contend that the Examiner, in preparing the Model Answer, did not follow the General Instructions supplied to the Petitioner by the Board of Bar Examiners. The Petitioner was forced to rely on the General Instructions supplied by the Board of Bar Examiners in selecting his answer. For that reason, the Bar Examiner's Model Answers constitute an arbitrary and/or capricious error which resulted in a substantial misgrading of the Petitioner's

examination. Therefore, the grade awarded is unjustified by the merits of the answer.

The question contained no set of specific instructions (See Exhibit #1 for full text.) Therefore, the Petitioner had no choice except to rely on the General Instruction provided. The instructions contain the following rules in pertinent part beginning with number sixteen. (See Exhibit #3 for full text.)

"Read each question carefully and analyze it fully. Serious errors may result from failure to read or understand the facts or from failure to organize the answer. Do not copy

the question or restate the facts except for emphasis or to make a particular application of the law to the facts.

Write concisely and clearly. PLEASE USE A BLACK BALLPOINT PEN. Confine your answer to a discussion of the particular issues raised by the question but give a complete answer to those issues. Do not waste your time by volunteering irrelevant information or by repeating. If a direct question is asked, answer it directly. If you present arguments for different possible views, be certain that you decide the issue. In framing your answer, use complete

sentences. Do not use abbreviations or slang.

Each answer should show an understanding of the facts, a recognition of the issues involved, the principles of law applicable and the reasoning employed to reach the conclusion. Questions are intended to be inquiries on fundamental points of law on each subject. Do not search for hidden meanings, "catches" or remote exceptions since none are intended. Let your answer represent your best judgment in each instance on the plain meaning of the question.

Lengthy discussions in a general field of law will not be helpful.

Answer only the questions presented. For example: If the question is what are the rights of A against B, it will not be helpful to discuss the rights of B against A, although defenses available to B may be important.

Unless it is otherwise indicated in the question, you may assume that in each question all parties are domiciled in Mississippi; all actions and transactions occur in Miss.; all court proceedings are brought in the state courts of Miss.; and all property, real and personal, is situated in Miss. unless otherwise stated.

With a careful reading of the General Instructions, one gleans the following rules:

1. Write concisely and clearly;

2. Do not waste your time by volunteering irrelevant information or by repeating;

3. Let your answer represent your best judgment in each instance on the plain meaning of the question;

4. Lengthy discussions in a general field of law will not be helpful;

5. Unless it is otherwise indicated in the question, you may assume that in each question all

parties are domiciled in Mississippi; all actions and transactions occur in Miss.; all court proceedings are brought in the state courts of Miss.; and all property, real and personal, is situated in Miss. unless otherwise stated.

With these rules in mind, analysis of the Model Answer reveals: the Examiner did not violate rule number one. The writing of the Model Answer was clear and concise; however, the Examiner did violate rules numbered 2 - 5.

The Examiner in his Model Answer gives the majority of his point value for a discussion of undue influence

and the presumption that applies in some instances. (See Exhibit #4 for full text.) However, the Examiner feels that "it would be difficult for the Chancellor to rule that the presumption would arise." The Petitioner agrees that the presumption would not arise, and did not discuss the presumption because he made his best effort not to volunteer irrelevant information.

In the Petitioner's best judgment, the plain meaning of the question ruled out the presumption as a viable answer. On this he is in agreement with the Model Answer. The Petitioner felt that this lengthy

discussion of a presumption in a general field of law that did not apply would not be helpful.

The Petitioner would point out (See Exhibit #4 for full text.) that for this lengthy discussion in a general field of law, more specifically a discussion of the presumption that did not apply, the Examiner awarded 34 points. If the Petitioner had received less than one-half of these points, he would have obtained a passing score on the examination. In fact, 16 points would reflect a score change from 69.3 to 70.0266.

Finally, as previously pointed

out, there was an indication (See Exhibit #2 for full text) in the question that the actions and transactions did not occur in Mississippi and that they instead, as otherwise stated, occurred in Italy.

CONCLUSION:

In summation, the Petitioner respectfully submits that the Bar Examiner made an error in question preparation, and in the manner in which the Examiner followed the General Instructions. For that reason, the Bar Examiner's Model Answers constitute an arbitrary and/or capricious error which resulted in a substantial misgrading

of the Petitioner's examination. Therefore, the grade awarded is unjustified by the merits of the answer. Thank you for considering the Petitioner's arguments.

DOMESTIC RELATIONS SYNOPSIS:

The Bar Examiner unintentionally based his answers on the view point that ethical considerations do not apply in the area of Domestic Relations law. The Model Answer was prepared with this contention in mind. It allowed for no argument that a Domestic Relations client, when a violation of the Mississipi Rules of Professional Conduct, has been committed could institute and

maintain a malpractice action against his or her attorney.

DISCUSSION OF DOMESTIC RELATIONS EXAMINATION:

QUESTION NUMBER ONE:

In paragraph two of the Domestic Relations question number one, more specifically paragraph number two, the facts and question on which the Petitioner relied are stated as follows in pertinent part:

"Jane comes to you for help. She did not have assistance of counsel during the negotiations for the divorce and relied upon Joe and his attorney for advice."

"Question: What are Jane's remedies,

if any? Discuss." (See Exhibit #5 for full text)

The Examiner states that Jane relied upon Joe's attorney for advise in this no-fault divorce proceeding, and then the question follows what are Jane's remedies. The Model Answer unequivocally ignores one of her strongest arguments. (See Exhibit #6 for full text)

The Petitioner asserts that under the Mississippi Rules of Professional Conduct it is unethical for a lawyer to undertake such a representation and could be subject to a malpractice action and/or disciplinary action for his administering such

representation. The Rule in question 1.7(b) Conflict of Interest: General Rule is stated as follows:

"(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests unless the lawyer reasonably believes:

(1) the representation will not be adversely affected and

(2) the client has given knowing and informed consent after consultation. The consultation shall include explanation of the

implications of the representation and the advantages and risks involved.

The Examiners may feel that further clarification is needed in order for the Petitioner to maintain the position he stated in his answer which reads as follows in pertinent part:

"Jane has two possible actions the first is a malpractice action against Joe's attorney for representing two clients with opposing points of interest....."

In search for a further clarification one need only examine Ethics Opinion No. 80 of The

Mississippi State Bar Association rendered March 25, 1983. This opinion reflects that there were two separate requests made to the Ethics Committee to render an opinion; at issue here is the second request. In pertinent part, the opinion states the following:

"...The second request is whether an attorney may represent both parties in a no-fault divorce proceeding...."

"...In the opinion of the Committee, the interest of the parties to a no-fault divorce are conflicting, inconsistent, diverse, and otherwise discordant, no matter

what the parties themselves, as laymen, may believe otherwise. Common representation entails parallel duties to both parties;...."

"...Consequently, there is simply no way that the lawyer may avoid the possibility that his loyalty will be divided if he accepts or continues such employement..."

"...The Committee is, therefore of the opinion that the representation of both parties to a no-fault divorce violates the Code of Professional Responsibility in general, and in particular Disciplinary Rules 5-105(A) and 5-105(C) and that it is therefore,

unethical for a lawyer to undertake such multiple representation."

The Petitioner has included as Exhibit #8 Disciplinary Rules 5-105(A) and 5-105(C) due to the fact that they were cited in Ethics Opinion #80 and the Examiners may wish to review them in making their decision.

The Petitioner understands the Examiner may have taken the position that the question only concerned Domestic Relations. However, the Petitioner takes the position that ethical considerations are inherent throughout the field of law. Therefore, when this issue presents

itself, a lawyer must address it.

CONCLUSION:

In summation, the Petitioner respectfully submits that the Bar Examiner made an error in preparing the Model Answer. It allowed for no argument that a Domestic Relations client, when a violation of the Mississippi Rules of Professional Conduct has been committed, could institute and maintain a malpractice action against his or her attorney. For that reason, the Bar Examiner's Model Answers constitute an arbitrary and/or capricious error which resulted in a substantial misgrading of the Petitioner's examination.

Therefore, the grade awarded is unjustified by the merits of the answer. The Petitioner thanks you for considering his arguments.

WORKMAN'S COMPENSATION SYNOPSIS:

The Bar Examiner graded the examination based on a question that did not contain the proper structure to gain the response he desired. The question was drafted without a set of specific instructions which forced the Petitioner to rely on the General Instructions supplied by the Board of Bar Examiners in selecting his answer. The Examiner could have supplied a set of specific

instructions but neglected to do this. For that reason, the Bar Examiner's Model Answers constitute an arbitrary and/or capricious error which resulted in a substantial misgrading of the Petitioner's examination. Therefore, the grade awarded is unjustified by the merits of the answer.

DISCUSSION OF WORKMAN'S COMPENSATION EXAMINATION:

The Model Answer did not follow the General Instructions supplied to the Petitioner by the Board of Bar Examiners. The Petitioner was forced to rely on the General Instructions supplied by the Board of Bar

Examiners in preparing his answer because the question contained no set of specific instructions (See Exhibit #9 for full text). The instructions contain the following Rules in pertinent part beginning with Number 16. (See Exhibit #3 for full text).

"Read each question carefully and analyze it fully. Serious errors may result from failure to read or understand the facts or from failure to organize the answer. Do not copy the question or restate the facts except for emphasis or to make a particular application of the law to the facts.

Write concisely and clearly.

PLEASE USE A BLACK BALLPOINT PEN. Confine your answer to a discussion of the particular issues raised by the question but give a complete answer to those issues. Do not waste your time by volunteering irrelevant information or by repeating. If a direct question is asked, answer it directly. If you present arguments for different possible views, be certain that you decide the issue. In framing your answer, use complete sentences. Do not use abbreviations or slang.

Each answer should show an understanding of the facts, a recognition of the issues involved,

the principles of law applicable and the reasoning employed to reach the conclusion. Questions are intended to be inquiries on fundamental points of law on each subject. Do not search for hidden meanings, "catches" or remote exceptions since none are intended. Let your answer represent your best judgment in each instance on the plain meaning of the question.

Lengthy discussions in a general field of law will not be helpful. Answer only the questions presented. For example: If the question is what are the rights of A against B, it will not be helpful to discuss the rights of B against A, although

defenses available to B may be important.

Unless it is otherwise indicated in the question, you may assume that in each question all parties are domiciled in Mississippi; all actions and transactions occur in Miss.; all court proceedings are brought in the state courts of Miss.; and all property, real and personal, is situated in Miss. unless otherwise stated."

With a careful reading of the General Instructions, one gleans the following rules:

1. Write concisely and clearly;

2. Do not waste your time by

volunteering irrelevant information or by repeating;

3. Let your answer represent your best judgment in each instance on the plain meaning of the question;

4. Lengthy discussions in a general field of law will not be helpful;

5. Unless it is otherwise indicated in the question, you may assume that in each question all parties are domiciled in Mississippi; all actions and transactions occur in Miss.; all court proceedings are brought in the state courts of Miss.; and all property, real and personal, is situated in Miss. unless otherwise

stated.

The Examiner could have supplied a set of specific instructions and the error on his part could have been rectified. A perfect example of a well written set of instructions was supplied on the Discovery and Evidence section of the Bar Exam in February of 1989 the instructions appeared as follows:

"These questions are designed, unless specifically noted, that the answers may be pursuant to the Mississippi Rules of Civil Procedure or the Federal Rules of Civil Procedure or the Mississippi Rules of Evidence or the Federal Rules of

Evidence. Although reference should be made to a particular rule of procedure, i.e., M.R.C.P. Rule 26(b) or a particular rule of evidence, i.e., F.R.E. 403, the questions should be answered with more than the statement of the rule. A brief analysis is generally required for a correct answer.

If facts are missing which you deem necessary to give a proper answer, state what facts are necessary to properly answer the question."

However, no set of specific instructions were supplied, thus the Petitioner was forced to rely on the

rules gleaned from the General Instructions. (See Exhibit #3 for full text) With these rules in mind, analysis of the Model Answer reveals: The Examiner did not violate rules numbered one, three or five. However, the Examiner did violate rules two and four. The Examiner in his Model Answer states in pertinent part as follows: (See Exhibit #10 for full text)

"...Another obvious defense to be raised is the satute of limitations. A claimant has two years from the date of injury fo file a claim unless the employer has paid compensation under those circumstances...

date that the employer files with the Commission a final report form called a B-31, Report of Payment and Settlement Receipt. Since the facts indicate that the claim obviously will not be filed within two years from the date of the injury, a possible argument to counter that defense is that the employer's continuation of the claimant's salary during his lost time after the accident should be construed as salary in lieu of compensation, and under those circumstances, the two year statute would not be applicable.

The Petitioner contends that this analysis is used to initiate a

discussion in the general field of law, and that this is a violation of the rules gleaned from the General Instructions.

CONCLUSION:

In summation, the Petitioner respectfully submits that the Bar Examiner made an error in not following the General Instructions, when the Examiner had not supplied a set of specific instructions to allow for the answer he prepared. For that reason, the Bar Examiner's Model Answers constitute an arbitrary and/or capricious error which resulted in a substantial misgrading

"...Since the facts indicate that the claim obviously will not be filed within two years from the date of the injury."

The facts of the question clearly indicated (See Exhibit #9 for full text) that the claim could not be filed in two years. The Petitioner brought out this issue, and then began his answer following the General Instructions. The Petitioner was forced to discuss the remedy available if the Workman's Compensation Act did not apply. The Petitioner contends that the logical response from this point was to assume that the employer had not

obtained the insurance. This assumption would allow for the only discussion now available, the claimants common law rights and available causes of action. The Petitioners answer reads in pertinent part as follows:

"...The employee has 2 years to bring his claim, and this is where Roger has his trouble(.) the accident occurred, October 19, 1986 and Roger comes to you March 1, 1989, the two year statute of limitations has run. (assumption follows) Roger can only hope that the employer was not covered because if he is (in) the course of action for Roger (it) is

over (,) his claims would be barred. However, if the employer is not covered Roger can bring a common law action because the statute of limitations is generally 6 years..." (See Exhibit #1 for full text)

With these points established, the Petitioner states that the Bar Examiner's Model Answer violated rule two in that he volunteered irrelevant information, and rule four in that he went into a lengthy discussion in the general field of Workman's Compensation law. The Examiner continued his discussion of Workman's Compensation law after he had decided that the statute of limitations would

bar a recovery. (See Exhibit #10 for a full text)

The Examiner in paragraph 1 on Page 2 begins his attempt to make a transition from applicable law to a general discussion in the field of Workman's Compensation law which is a violation of the General Instructions. He states in pertinent part as follows:

"Another obvious defense to be raised is the statute of limitations. A claimant has two years from the date of injury to file a claim unless the employer has paid compensation; under those circumstances, a claimant has one year to make a claim from the

of the Petitioner's examination. Therefore, the grade awarded is unjustified by the merits of the answer. The Petitioner thanks you for considering his arguments.

MODEL ANSWER TO WILLS AND ESTATES PROBLEM MISSISSIPPI BAR EXAM - FEBRUARY, 1989

Since there is no contest to the earlier will, then the only issues revolve around whether the later will is valid. The rule in Mississippi is that when a will contains a bequest to a person in a confidential relationship with the testator (9 points), which beneficiary is actively concerned with the preparation of the will (9 points), a presumption of undue influence arises. Croft v. Alder, 237 Miss. 713, 115 So. 2d 683 (1959).

The burden then shifts to the proponent of the will to prove by clear and convincing (4 points) evidence of: (1) good faith on the part of the grantee/beneficiary (2 points); (2) and (c) devoted wholly to the grantor/testator's interest(2 points). Murray v. Laird, 446 So. 2d 575, 579 (Miss. 1984)

The facts of this cases are that Antonio was deeply involved in the making of the will of the elder Gabrielli which will left most of his possessions to Antonio. The remaining question is whether Antonio occupied a confidential relationship with his father (6 points). There is

not much evidence in the question to go on, but from the fact that Antonio was disinherited in the distant past would be somewhat probative that the two were not close. Under these facts, it would be difficult for the Chancellor to rule that the presumption would arise.

If the Chancellor does, however, rule that the presumption does arise (perhaps from hearing testimony not in this question), then Antionio will have a difficult time overcoming it since there is no proof whatever that the elder Gabrielli had any kind of disinterested advice. Hipshot was Antonio's lawyer whose

loyalty obviously was to Antionio (5 points).

It is entirely possible, however, that the Court would declare the will to be invalid as the product of undue influence without the mechanics of the presumption/ rebuttal. (5 points) There are facts in this question which indicate that the old man was feeble and that he was either coerced into signing the will or even that the will was executed solely by Celeste. See In re Will and Estate Varvaris 477 So. 2d 273 (Miss. 1985); on remand. In re Estate of Varvaris, 528 So. 2d (Miss. 1988)